

MURPHY OIL CORP.

IBLA 98-409

Decided December 16, 1998

Appeal from a decision of the Director, Minerals Management Service, holding that a notice of appeal was untimely. MMS-98-0112-OCS.

Reversed and remanded.

1. Minerals Management Service: Generally--Rules of Practice: Appeals: Timely Filing

As used in 30 C.F.R. § 290.5(b), a document is transmitted when custody and control of the document is surrendered to an agency charged with delivering the document to the proper office.

2. Minerals Management Service: Generally--Rules of Practice: Appeals: Timely Filing

The fact that an envelope containing a notice of appeal bears a postmark after the date that the notice of appeal was due, while relevant, is not preclusive of a finding that the notice of appeal was transmitted prior to the date due within the meaning of 30 C.F.R. § 290.5(b).

APPEARANCES: Timothy D. New, Esq., El Dorado, Arkansas, for Murphy Oil Corporation; Geoffrey Heath, Esq., and Christopher P. Salotti, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By letter dated March 24, 1998, the Chief, Production Accountability Branch, Compliance Verification Division, Minerals Management Service (MMS), informed Murphy Oil Corporation (Murphy), *inter alia*, that, because MMS had been unable to resolve a reporting discrepancy with the operator of certain OCS leases, it was holding various lessees of record and owners of operating rights, including Murphy, responsible for their proportionate share of the volume discrepancy. Murphy was directed to submit an adjustment report showing volumes as indicated in an enclosed schedule and to

tender any additional royalties due thereon. Murphy was also advised of its right to appeal this determination in accordance with the provisions of 30 C.F.R. Part 290.

The record indicates that Murphy received its copy of this letter on March 31, 1998. By letter dated April 30, 1998, Murphy formally appealed from the MMS determination, noting that its records did not support the volumes reported by the operator. This letter was received by MMS on May 5, 1998, in an envelope postmarked May 1, 1998. By instrument dated May 20, 1998, MMS informed Murphy that it could not consider Murphy's appeal because it was untimely. Murphy thereupon appealed that determination to this Board.

Together with its appeal, Murphy has submitted an affidavit from its attorney who attests that "[o]n April 30, 1998 I signed and placed into the United States mail a Notice of Appeal regarding" the MMS determination. Murphy notes that, while MMS apparently relied on the fact that the notice of appeal was postmarked 1 day late in rejecting the appeal, there is, in fact, no provision in the regulations which requires a postmark within the 30-day period as a precondition to finding that the appeal was timely transmitted.

In response, MMS argues that its rejection of Murphy's appeal was proper. Noting that the Department has repeatedly held that it may not entertain a late notice of appeal, MMS asserts that its decision was clearly correct since the envelope containing the notice of appeal was not timely postmarked and, under applicable precedent, the postmark is presumptively the date of transmittal. (MMS Answer at 3-4.) Furthermore, MMS argues that, even if the Board considered Murphy's affidavit from its attorney as evidence of transmittal, the affidavit would not actually establish that the notice of appeal was transmitted timely since it does not state whether the submission was personally handed to a postal employee or dropped into a mail box at night. (MMS Answer at 4-5.)

Initially, we note that this Board has held that, just as the failure of a party to timely file a notice of appeal to the Board deprives the Board of the jurisdiction to consider the appeal (see, e.g., BLM v. Fallini, 136 IBLA 345 (1996); United States Forest Service, 124 IBLA 336 (1992)), so, too, the late filing of a notice of appeal to the Director, MMS, pursuant to the procedures established by 30 C.F.R. Part 290, requires dismissal of the appeal by the Director unless the late filing can be waived under applicable regulations. See Walter Van Norman, 114 IBLA 56, 62 (1990); Pennzoil Oil and Gas, Inc., 61 IBLA 308 (1982). While there is no question that the notice of appeal herein was, in fact, filed late since it was not received within 30 days as required, resolution of the appeal turns on the issue of whether or not the delay in filing could be waived under the applicable regulation, i.e., 30 C.F.R. § 290.5(b).

[1] For many years, the regulations with respect to MMS (and its predecessor, Geological Survey) appeals provided no exception to the

strict rule that a notice of appeal must be received within 30 days to be considered timely. See Mesa Petroleum Co., 44 IBLA 165 (1979). In 1989, however, the regulation was amended to permit consideration of a late filed appeal if the notice of appeal was transmitted to the proper office within the period in which it was required to be filed and it was actually received not later than 10 days from the due date. See Conoco, Inc., 115 IBLA 105, 106 (1990). In amending this regulation, MMS specifically noted that this amendment would bring its procedures into line with those of this Board as set forth at 43 C.F.R. §§ 4.401 and 4.411. See 54 Fed. Reg. 52796 (Dec. 22, 1989).

The regulation now provides, in relevant part, that:

A notice of appeal must be filed within the time provided in § 290.3 of this title. If the notice of appeal is not received in the proper office within that time, the delay in filing will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing in § 290.3(a)(1) of this title.

30 C.F.R. § 290.5(b). Since the instant appeal turns on the interpretation of the phrase "transmitted to the proper office" and that language was expressly added to bring MMS appeals in line with Board and BLM practice, we believe our interpretation of this phrase in the context of 30 C.F.R. § 290.5(b) must be guided by our past interpretations of 43 C.F.R. §§ 4.401 and 4.411.

In United States Forest Service, *supra*, we defined the concept of "transmitted" within the ambit of 43 C.F.R. § 4.401(a) as encompassing the "relinquishment of possession and control to an agency charged with the delivery of the document" to the proper office. *Id.* at 338. We believe a similar interpretation must be accorded to "transmitted" within the confines of 30 C.F.R. § 290.5(b), given both the similarity of the structure of the two regulations and the fact that the Board's regulation was specifically referenced in the regulatory preamble to the MMS regulation. Accordingly, we hold that under 30 C.F.R. § 290.5(b) transmittal of a notice of appeal occurs when the custody and control of the document is surrendered to an agency charged with delivering the notice of appeal to the proper office.

[2] Appellant essentially argues that it complied with the requirements of the regulation by depositing the notice of appeal in the U.S. mails on the date that it was due, a fact attested to by its attorney's affidavit. MMS, on the other hand, argues that, inasmuch as the envelope containing the notice of appeal was postmarked after the date due, it is impossible to find that the document was, in fact, timely transmitted. On this point, however, we find ourselves in agreement with appellant.

While it is true that the preamble to the rule noted that evidence showing timely transmission "could be a postmark" (54 Fed. Reg. 52796 (Dec. 22, 1998)), there is nothing in the regulation, itself, which can fairly be said to establish a requirement that the envelope containing a notice of appeal must be postmarked on or before the due date as a precondition to applying the regulatory provisions.

In this regard, we would contrast the regulatory language of both 30 C.F.R. § 290.5(b) and the Board's own grace period regulations with that which controls filings under the mining claim recordation and maintenance fee regulations (43 C.F.R. § 3833.0-5(m)). That latter regulation defines "filed" as "being received" by the proper BLM office and then notes that, for the purpose of complying with various specific requirements, "a filing or fee is timely if received within the time period prescribed by law, or if mailed to the proper BLM office, is contained within an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM State Office by 15 calendar days subsequent to such period." 43 C.F.R. § 3833.0-5(m). This BLM regulation clearly requires that the envelope contain a postmark evidencing cancellation on or before the date that filing was due as a precondition to allowing an otherwise late filing to be treated as timely and our decisions have so held. See, e.g., Clifford T. Frederickson, 144 IBLA 105, 107-108 (1998); Michael J. Whittle, 142 IBLA 61, 63 (1997); Bellmetal Enterprises, Inc., 140 IBLA 76, 78 (1997). The MMS regulation set forth at 30 U.S.C. § 290.5(b), on the other hand, simply does not establish the existence of a postmark evidencing cancellation on or before the due date as the sine qua non for a determination that the notice of appeal was timely received.

In the instant case, we have a notice of appeal which was dated within the 30-day period and an envelope which was postmarked 1 day late. We also have counsel's affidavit that he transferred custody and control of the envelope containing the notice of appeal within the 30-day period allowed for the filing of the notice of appeal. Counsel's statement, while certainly self-serving is, nevertheless, evidence of timely transmittal of the notice of appeal. ^{1/} Considering all the facts of this case, we believe counsel has established, by a preponderance of the evidence, that the notice of appeal was timely transmitted and, inasmuch as it was actually received within the 10-day grace period provided by 30 C.F.R. § 290.5(b), we hold that the notice of appeal was timely.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision

^{1/} Contrary to MMS' suggestion, there is no requirement that the Post Office be open for business at the time that the transfer of custody and control of the document occurs.

appealed from is reversed and the case files are remanded to the Director, MMS, for consideration of the substance of the appeal.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

147 IBLA 44